IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 921 of 2001

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA
HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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CHHATRASINH ALIAS CHATURSINH DANSINH RATHOD - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR JV JAPEE for Appellant(s) : 1,
PUBLIC PROSECUTOR for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 13/09/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE K. A. PUJ)

1. This appeal is filed by the appellant/original accused against the order and judgment dated 9.11.2001 passed by the learned Additional Sessions Judge, Sabarkantha at Himatnagar in Sessions Case No.119 of 2000, whereby the appellant was convicted for the offence punishable under Sections-363, 366, 376 and 506(2) of the I.P.C and was sentenced to undergo imprisonment of 5 years and fine of Rs.1,000/- (Rupees One Thousand Only) for the offence under Section 366 of the I.P.C. The appellant was also directed to undergo the imprisonment of 10 years and fine of Rs.3,000/- (Rupees Three Thousand Only) for

the offence punishable under Section-376 of the I.P.C. The appellant was further directed to undergo the imprisonment of 1 month for the offence punishable under Section-506(2) of the I.P.C and fine of Rs.100/- (Rupees One Hundred Only). All the orders of fine are with usual default clause and all the sentences of imprisonment are ordered to run concurrently.

2. The brief facts giving rise to the present appeal are as under :-

3. That on 28.2.2000 the prosecutrix Ms.X, daughter of the Mafabhai Gokalbhai Raval, aged about 15 years, went to see the magic show in her village, but she did not like the magic show and hence, she left the magic show at about 11:00 o'clock in the night and proceeded for her house. When she was passing through naliya (narrow cart road between the boundaries of the two field), the

accused person forcibly caught hold of her and gave threat for her life and forced her to accompany with him and reached Hadiyol village, at about 1:30 a.m at night. The accused showed the knife and subjected her to forcible intercourse with him. Thereafter, she was again forced her to accompany upto Ahmedabad through Prantij and stayed at the house of relative of the accused person, after introducing the prosecutrix as a wife and thereafter, when the uncle of the prosecutrix alongwith other persons came to Ahmedabad, prosecutrix narrated about the incident and ultimately she was taken to Navalpur village, and FIR came to be lodged with Himatnagar Town Police Station on 3.3.2000.

4. Pursuant to registration of FIR investigation was put into motion. During the course of investigation, statement of the witnesses were recorded, injury certificate

of the victim was obtained, panchnama of scene of offence was prepared, clothes of the accused as well as victims were also recovered by drawing the panchnama, which were sent to FSL for chemical analysis. After obtaining FSL report and the certificate issued by the doctor and also obtaining certificate showing ossification test, since sufficient incriminating evidence was found against the accused he was charge-sheeted in the Court of learned Judicial Magistrate First Class, Himatnagar.

5. As the offence under Sections-363, 366, 376 and 506(2) of the I.P.C was exclusively triable by the Court of Sessions, the learned Chief Judicial Magistrate, Himatnagar committed the case to the Sessions Court, Himatnagar. The learned Additional Sessions Judge, Himatnagar to whom the case was made over for trial, framed charge against the accused for the commission of the offence

punishable- 363, 366, 376 and 506(2) of the I.P.C. The charge was read over and explained to the accused as the accused pleaded not guilty to the charge. He was put to trial and tried by the learned Additional Sessions Judge, Himatnagar in Sessions Case No.119 of 2000.

6. To prove the culpability of the accused, prosecution has in all examined as many as 9 witnesses and produced several documents and relied upon the contents of the same.

7. After recording of the evidence of the prosecution witnesses was over, the learned Additional Sessions Judge, Himatnagar explained to the accused the circumstances appearing against him in the evidence of the prosecution witnesses and recorded his further statement under Section 313 of the Code. In his further statement, the accused had denied the case of the prosecution by

reiterating that he has been falsely implicated.

8. On appreciation, evaluation, analysis and close scrutiny of the evidence adduced by the prosecution, the learned trial Judge has held that victim was subjected to rape by the accused and the prosecution has established that the charge levelled against the accused was proved beyond reasonable doubt and, therefore, the accused was held guilty of the offence of kidnapping and rape and, therefore, he was convicted of the said offence.

9. Thereafter, the learned Additional Sessions Judge, Himatnagar heard accused and his advocate. Looking to the gravity of the offence committed by the accused and looking to the circumstances, accused was sentenced to suffer R.I for 5 years and fine of Rs.1,000/- (Rupees One Thousand Only) and in

default thereof, S.I of 3 months for the offence punishable under Section-366 of the I.P.C. The accused was also convicted for R.I for 10 years with fine of Rs.3,000/- (Rupees Three Thousand Only) and in default thereof S.I of 6 months for the offence punishable under Section 376 of the I.P.C. The accused was also convicted for S.I of 1 month with fine of Rs.100/- (Rupees One Hundred Only) and in default thereof S.I of 3 days for the offence punishable under Section 506(2) of the I.P.C. The learned Additional Sessions Judge, Himatnagar has also awarded compensation of Rs.3,000/- (Rupees Three Thousand Only) to the victim. All the sentences were ordered to run conccurently.

10. Being aggrieved by the said judgment and order, the accused has filed the present appeal under Section-374 of Code of Criminal Procedure.

11. In the memo of appeal, the impugned order and judgment is challenged on the ground that the trial Court has substantially erred in convicting the appellant for the offence punishable under Sections-376, 366 and 506(2) of the I.P.C. The trial Court has failed to appreciate that the prosecution has failed to prove beyond the reasonable doubt, the offences alleged against the appellant and, therefore, the appellant was entitled to acquittal. The trial Court further failed to appreciate that the only evidence before the Court regarding the age of the girl is the certificate given by the radiologist, who had certified that the age of the girl is between 15 to 16 and half years. If the permissible margin is considered then the age can be more than 18 years. In absence of any other evidence regarding the age, the medical evidence is to be believed. As per medical evidence, the age can be more than 16 years or 18 years. As per the settled principle of

criminal jurisprudence, the presumption is required to be made in favour of accused. Therefore, relying on the medical evidence regarding the age of the victim girl, it cannot be said that the appellant has committed any offence as alleged against him. The trial Court has further failed to appreciate that since the age factor does not come in the way of the appellant, then only thing required to be proved is whether the prosecutrix had consented to sexual intercourse or not. The trial Court failed to appreciate that the evidence in its totality clearly and unequivocally suggests that it was entirely as consent affair, which was given the colour of rape to falsely implicate the appellant.

12. The impugned order and judgment is also challenged on the ground that the evidence of victim girl, clearly reveals that she has silently accompanied the appellant to

different places. She had first gone to Mehtapura and thereafter to Hadiol. From Hadiol, she had gone to Prantij and from Prantij to Ahmedabad. It is not her case that at any point of time during her visit to different places alongwith the appellant, she had raised any hue and cry to invite the attention of passers by. It is also not her case that she had made any attempt to escape. It is not possible that the girl, who is raped will silently accompany the person, who had raped her. It is not possible unless there is a consent from the girl. Even the girl has admitted that during the rape she had not shouted. Apart from this, when the appellant introduced the girl to his uncle at Ahmedabad, as his wife, then also the girl had not clarified or protested. This evidence clearly indicates that the girl was a consenting party and, therefore, it cannot be said that the appellant had kidnapped or raped the girl.

13. The impugned order and judgment is also challenged on the ground that the medical certificate of the girl gives indication that she was accustomed to the sexual intercourse and she had indulged in the intercourse without any resistance. The trial Court has materially failed to appreciate that there are various contradictions in the oral evidence of different witnesses. There are material contradictions between the police statements of witnesses and their oral depositions. There was vital admission by the father of the complainant Mafabhai that the complaint was dictated by advocate Akbarbhai in the Police Station. Thus, the advocate has utilized his legal expertise to falsely implicate the appellant. It has also been borne out from the evidence that there was a quarrel between Mubaraq, the nephew of the said advocate and the appellant and, therefore, the said advocate was having

grudge against the appellant and he has, therefore, falsely implicated the appellant having fabricated a false case by using the alleged incident as a lever. As per the evidence of the girl and other witnesses, she and the appellant had come across in Ahmedabad, the persons of the village, who had come to search her at Ahmedabad. Ahmedabad is a big city and there cannot be such a co-incidence that the appellant and the girl will so easily come across the said persons on the streets of Ahmedabad. Therefore, the evidence of the prosecution witnesses is not at all reliable.

14. Though various grounds have been raised in the appeal memo, at the time of final hearing of this appeal, Mr.J.V.Japee, learned advocate appearing for the appellant has stated that he does not press this appeal on merits and his submissions are confined only to the quantum of punishment. According to

him, the sentence of R.I for 10 years imposed on the accused is harsh and does not commensurate with the guilt of the accused. Beside this, his submission is that by now the accused has already undergone imprisonment of more than 5 years and looking to the mitigating circumstances which have been highlighted by Savitaben Parmar, sister of the accused in her affidavit, has prayed that lenient view may be taken by showing mercy on the accused. He, therefore, urges that this appeal may be allowed by imposing the minimum sentence of 7 years punishable under Section 376(1), as admittedly the appellant-accused case does not fall within the ambit of Section-376(2) of the Act, as substantive sentence for commission of offence under Section-376 of the I.P.C by modifying the sentence imposed by the learned Additional Sessions Judge, Himatnagar. He, therefore, urges that the appeal may be allowed by reducing sentence showing sympathy

on the accused.

15.Mr.R.C.Kodekar, learned Additional Public Prosecutor appearing for the respondent-State has submitted that so far as the offence punishable under Section-376 of the I.P.C is concerned, it is punishable with imprisonment which may extend to 10 years and the learned trial Judge has imposed the punishment of 10 years. However, looking to the mitigating circumstances which have been highlighted by Savitaben Parmar, sister of the accused in her affidavit has submitted to pass appropriate order of reduction of sentence.

16.This Court has considered the submissions advanced by Mr.J.V.Japee, learned advocate appearing for the appellant-accused and Mr.R.C.Kodekar, learned Additional Public Prosecutor appearing for the respondent-State of Gujarat. We have also gone through the impugned judgment and order, evidence on

record, affidavit sworn by Savitaben Parmar, sister of the appellant-accused and other evidence on record. Savitaben Parmar, sister of the accused in her affidavit has shown the following mitigating circumstances for reduction of sentence;-

(a) father of the accused has died prior to about 3 years.

(b) the appellant had lost his mother in his childhood.

(c) his elder brother – Agarsinh Rathod is of unsound mind and he is wondering here and there and not residing at a fixed place.

(d) there is no one at the residence of the appellant.

(e) his residential house at the village is also collapsed and since he is in jail, no steps could be taken to rebuild the house.

(f) he is having a small parcel of land admeasuring 2 vighas but there is no one in the family at present to cultivate the land.

(g) other relatives are at present

cultivating the land but they are likely to create their illegal rights upon the said land.

(h) they are not giving any share in the crops to the family of the appellant.

17. In view of the aforesaid mitigating circumstances and the affidavit of Savitaben Parmar and since there is nobody to take care of his land, more particularly when the accused has already undergone sentence of more than 5 years, we are of the opinion that the sentence of R.I for 10 years imposed on the accused for the commission of the offence punishable under Section-376 of the I.P.C deserves to be reduced by imposing the minimum sentence of 7 years as substantive sentence. However, the punishment imposed for the commission of offence under Section-366 and 506(2) of the I.P.C deserves to be maintained.

18.For the foregoing reasons, the appeal succeeds in part qua sentence only. While maintaining the order of conviction, the sentence imposed on the accused for commission of offence punishable under Section-376 of the I.P.C by the learned Additional Sessions Judge, Himatnagar is reduced and the period of sentence is reduced to the minimum period of 7 years for the offence punishable under Section-376 of the I.P.C as substantive sentence for the said offence. So far as sentence imposed for commission of the offence punishable under Section-366 and 506(2) of the I.P.C is concerned, the same is confirmed. As all the 3 sentences are ordered to run concurrently and the accused has already undergone R.I for more than 5 years, he shall be set at liberty on completion of the period of 7 years subject to remission for which the accused is entitled to, if he would not be required in connection with any other case, at the time

of his release.

19. Affidavit sworn by Savitaben, sister of the accused is ordered to be retained on the record of the case.

20. Subject to the above directions and observations, the appeal is accordingly disposed off as partly allowed.

(A. M. KAPADIA,J.) (K. A. PUJ, J.)

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